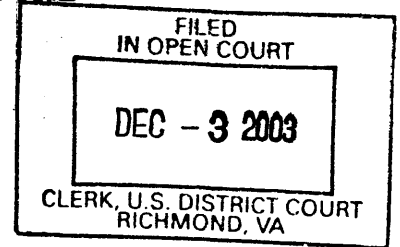


IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Richmond Division



UNITED STATES OF AMERICA

v.

BEN JOHN BARBOT,

Defendant.

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) CRIMINAL NO. 3:03CR272
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STATEMENT OF FACTS

The United States and the Defendant stipulate that the following facts are true and correct and, that had the matter gone to trial the United States could have proven each of them beyond a reasonable doubt:

1. During all relevant times relating to the charged offenses, the defendant lived at 2602 Foxbush Court, Richmond, Virginia, 23233, which is located in the Eastern District of Virginia.

2. Sometime before June 7, 2001, the defendant BEN BARBOT began selling computer software over the Internet using various web pages that he had created through such Internet Service Providers ("ISP") as Yahoo and MSN/Hotmail. The software BARBOT sold was advertised to be and packaged to appear to be Microsoft software, in particular, Microsoft's Office Professional 2000.

3. On June 16, 2001, BARBOT received via certified mail a cease and desist letter, dated June 7, 2001, from the law firm of Preston, Gates, and Ellis, L.L.P. That letter was captioned "Cease and Desist Illegal Distribution of Counterfeit Retail Microsoft ® Software." The letter was addressed to "T.G.F.C., 2602 Foxbush, Richmond, VA 23233," and stated "T.G.F.C. has distributed purported Microsoft Office 2000 Professional software, which *Microsoft has analyzed and identified to be counterfeit.*" (Emphasis in original). BARBOT signed the return receipt for this certified letter.

4. Following receipt of this letter, BARBOT continued selling counterfeit Microsoft Office 2000 Professional software from a different web-based store called "eSoftware Outlet." On or about August 1, 2001, BARBOT signed for and received another letter sent via certified mail. The letter, dated July 31, 2001, was addressed to "eSoftware Outlet, 2602 Foxbush, Richmond, VA 23233," and provided the same warning described in the cease and desist letter addressed to T.G.F.C.

5. On September 12, 2001, the law firm of Preston, Gates and Ellis, L.L.P., sent via certified mail, another letter notifying the defendant of the "Illegal Distribution of Counterfeit Microsoft Software." The letter was addressed to "Ben Barbot d/b/a ABB Consignments d/b/a T.G.F.C. d/b/a eSoftware Outlets, 2602 Foxbush, Richmond, VA 23233." That letter was returned to the law firm after it went unclaimed following several notices to the defendant.

6. On January 9, 2002, three copies of another demand letter and accompanying settlement agreement were sent via certified mail to the following addressee:

eSoftware Outlet a.k.a. Robert Meadows
PMB 287, 10831 W. Broad Street
Glen Allen, VA 23060

This address was for a mailbox at commercial mailbox establishments rented by BARBOT. The demand letter made specific reference to the distribution of counterfeit Microsoft Office 2000 Professional software. An employee for the commercial mailbox establishment at PMB 287, 10831 W. Broad Street signed for this letter and placed it in BARBOT's mailbox.

7. During the execution of a search warrant on BARBOT's home at 2602 Foxbush Court on December 5, 2002, investigators recovered a complimentary customer letter, dated November 10, 2001, addressed to "eSoftware Outlet, Suite 287, 10831 West Broad Street, Glen Allen, VA 23060."

8. Despite these repeated warnings, the defendant continued to distribute counterfeit Microsoft Office 2000 Professional software. BARBOT created several more web-based stores, including Best Byte Software at www.bestbytesoftware.com, and another store called Bright Software that BARBOT established as an online store made available through Yahoo.com. The mailing addresses for Best Byte Software were 4121 Plank Road, Suite 402, Fredericksburg, VA, 22407, and 3420 Pump Road, Suite 113, Richmond, VA, 23233. Both of these mailing addresses were commercial mailbox addresses leased by BARBOT. From February to May 2002, Microsoft investigated numerous reports of counterfeit software purchased from the defendant's online stores and determined that the software and end user licensing agreements ("EULAs") were counterfeit.

9. On May 30, 2002, a demand letter and accompanying settlement agreement pertaining to the "Illegal Distribution of Counterfeit Microsoft Software" was sent via certified mail addressed to "Best Byte Software, 3420 Pump Road, Suite 113, Richmond,

VA, 23233.” The postal receipt for that certified mail was signed by an employee for Mailboxes, etc. on June 6, 2002, and placed in the defendant’s mailbox.

10. On June 14, 2002, the defendant executed the above-referenced settlement agreement, and returned it to the law firm of Preston, Gates and Ellis, L.L.P. The defendant also sent a cashier’s check made payable to Microsoft for \$15,000 to settle the dispute. In his letter accompanying the settlement agreement, BARBOT, writing as “Bob Spencer” representing Best Byte Software, denied knowing that the items were counterfeit and denied possessing any software media or EULAs that were counterfeit. Several e-mails recovered from BARBOT’s work and home computers were sent from and addressed to “bestbytesoftware.com.”

11. BARBOT created yet another Internet store for the distribution of counterfeit software called “brightsoftwarestore.com.” BARBOT used the name “Best Byte Software” as the WHOIS registrant for this Internet address, and leased a commercial mailbox at 13146 Midlothian Turnpike, #305, Midlothian, VA, 23113, as the mailing address for this new Internet store. Several e-mails recovered from BARBOT’s work and home computers were sent from and addressed to “brightsoftwarestore.com.”

12. In July 2002, Microsoft received several complaints from private consumers regarding possible distribution of counterfeit Office 2000 Professional and Windows ME software purchased from “brightsoftwarestore.com.” Analysis by Microsoft determined that the software, packaging and EULAs were counterfeit.

13. On August 16, 2002, Microsoft Corporation made a controlled purchase over the Internet of Windows 2000 Office Professional Software from Best Buy Software, Suite 305, 13146 Midlothian Turnpike, Midlothian, VA, 23113. Analysis of the received product

determined that the packaging, proprietary hologram, and software were all counterfeit. On or about August 27, 2002, Microsoft Corporation made another controlled purchase over the Internet of Windows 2000 Office Professional Software from Bright Software, Suite 402, 4121 Plank Road, Fredericksburg, VA, 22407. The package received by Microsoft contained a counterfeit EULA, counterfeit software, and a bogus troubleshooting sheet.

14. On October 2, 2002, BARBOT created yet another Internet-based store for the distribution of counterfeit Microsoft software. This one was called "wahoowarehouse.com." BARBOT used two mailing addresses for this store: 1) 9702 Gayton Road, Suite 324, Richmond, VA, 23233; and 2) 977 Seminole Trail, Suite 314, Charlottesville, VA, 22901, both of which were commercial mailboxes leased by the defendant.

15. From August to November 2002, Investigators from the U.S. Customs Service made online undercover purchases of Microsoft Office 2000 Professional software from BARBOT's web-based stores known as Best Buy Software, Bright Software, and Wahoo Warehouse. Analysis by Microsoft determined that in all cases the software and any accompanying packaging or licensing agreements were counterfeit.

16. On December 3, 2002, investigators with the U.S. Customs Service and FBI executed search warrants on BARBOT's home and home computer. Additionally, investigators executed a federal search warrant on BARBOT's work computer at Old Dominion Electric Cooperative in Glen Allen, Virginia. Subsequent forensic analysis of BARBOT's home and work computers showed the defendant received numerous complaints from customers regarding the software he had distributed to them.

Additionally, recovered e-mails showed that BARBOT used such alias as “Tony,” “Richard,” “Tammy,” “John” and “Ernie” when corresponding with customers regarding the software he had shipped them.

17. Investigators recovered several spreadsheets from BARBOT’s home computers relating to the Internet sale of software. One spreadsheet entitled “oo.xls” revealed that in less than one month’s time—from October 11, 2002, to November 7, 2002—BARBOT made over 1500 separate software transactions over the Internet, with orders varying in value from \$180 to \$18,755.

18. During the search of BARBOT’s home at 2602 Foxbush, investigators recovered numerous copies of counterfeit software, counterfeit EULAs, FEDEX packaging materials, and other materials related to the distribution of counterfeit software.

19. Investigators independently determined that during the period of approximately one-year prior to the search on BARBOT’s home, one of BARBOT’s primary suppliers for counterfeit Microsoft software was an individual operating in the area of San Diego, California. During the latter part of that time period, BARBOT typically placed orders for 1,000 CDs at a time of Microsoft Office 2000 Professional at approximately \$50 each from this individual.

20. BARBOT signed a written waiver of his Miranda rights and gave a statement to investigators at the time of the search of his home. In that statement BARBOT indicated that all the proceeds for his software sales over the Internet were deposited in his checking account with First Union Bank. Bank records indicate that from June 16, 2001—the date BARBOT signed for his first cease and desist letter—to December 9, 2002, BARBOT’s net payroll from Old Dominion Electric Cooperative totaled \$ 63,918.52. During that same

period, BARBOT received over \$3,900,000 gross deposits from various credit card companies, Internet escrow services, checks and cash resulting from his sale of counterfeit Microsoft software over the Internet.

21. During the relevant time period of June 16, 2001, to December 4, 2002, the defendant distributed over 17,000 units (CDs) of counterfeit Microsoft software. The defendant and the United States stipulate that, for relevant conduct purposes, the total retail value of infringed Microsoft software during the relevant time period exceeded seven million dollars (\$7,000,000.00) but was less than twenty million dollars (\$20,000,000.00).

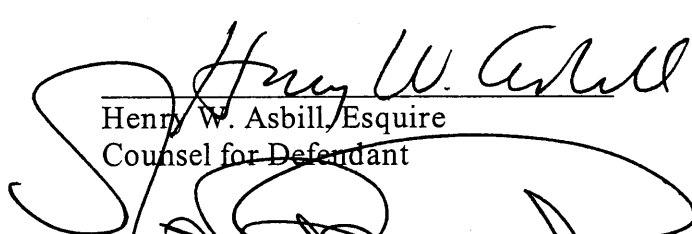
I have consulted with my attorney regarding this Statement of Facts. I knowingly and voluntarily agree that each of the above-recited facts is true and correct and that had this matter gone to trial the United States could have proven each one beyond a reasonable doubt.

12/3/03
Date

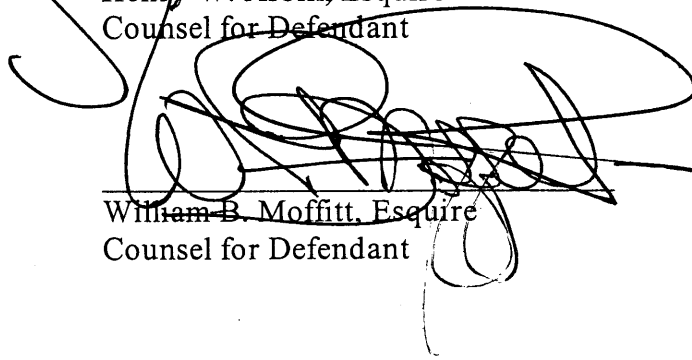

BEN JOHN BARBOT

I am counsel for defendant, BEN JOHN BARBOT. I have carefully reviewed this Statement of Facts with him and to my knowledge his decision to agree to this Statement of Facts is an informed and voluntary decision.

Date 12/3/03


Henry W. Asbill, Esquire
Counsel for Defendant

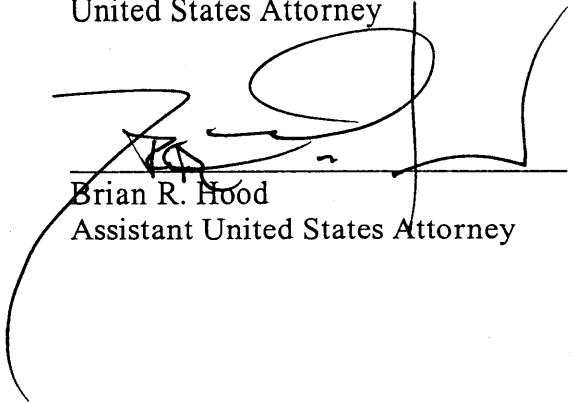
Date 12/3/03


William B. Moffitt, Esquire
Counsel for Defendant

Respectfully submitted,

PAUL J. McNULTY
United States Attorney

By:



Brian R. Hood
Assistant United States Attorney